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In the Supreme Court of the United States

OCTOBER TERM, 1959

**OTHO G. BELL, WILLIAM A. COWART, AND LEWIE W.
GRIGGS, PETITIONERS**

v.

UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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(1)

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1-17) is reported at 181 F. Supp. 668.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960. The petition for a writ of certiorari was filed on May 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

*Whether petitioners, captured American soldiers who voluntarily served the enemy during the Korean hostilities and subsequently refused repatriation to

this country, are entitled to pay and allowances for the period between their capture by the enemy forces and their discharge from the army.

STATUTES INVOLVED

The Missing Persons Act (56 Stat. 143), as amended, 50 U.S.C. App. (1952 ed.) 1001 *et seq.*, provides in pertinent part (as it appeared in the United States Code):

§ 1001. *Definitions*

For the purpose of this Act [sections 1001-1016 of this Appendix]—

* * * *

(b) the term "active service" means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a) (3) above;

§ 1002. *Missing, interned, or captive persons; continuance of pay and allowances*

Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter,

and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided*, That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further*, That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period.

§ 1009. *Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death*

The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. * * * When circumstances warrant reconsideration of any determination authorized to be made by this Act

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[said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination.

R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846) provides:

Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law.

STATEMENT

Petitioners enlisted in the army in 1949. During the Korean conflict, they were captured and detained by North Korean and Chinese Communist forces (Findings 2 and 3; Pet. App. 18-19). The unchallenged findings of the court below are that during the period of their detention petitioners voluntarily and actively served the enemy. In the prisoner of war camps to which they were assigned, they acted as squad monitors or leaders; in that capacity, they procured communist propaganda, and forced the other American prisoners to read it and comment favorably upon it. If the other prisoners refused to comply,

petitioners reported their names and they thereafter received smaller food rations or were otherwise punished. Upon the recommendations of petitioners, prisoners who disobeyed, criticized or talked back to petitioners were punished, *e.g.*, by hard labor, reduced rations, or by being forced to stand all day in the sun or in an icy river (Findings 7, 14, 15, 21, 25, 26; Pet. App. 20, 24-25, 26, 28-29, 30-31).

Petitioners also acted as the enemy's informers within the prison camps. They gave the Chinese the names of other prisoners who planned to escape or otherwise resisted the enemy. As a result, American prisoners were placed in solitary confinement, bayoneted, and punished in other ways (Findings 15, 21, 26; Pet. App. 25-26, 28-29, 31). At least one prisoner died as a direct result of such a report by petitioner Bell (Finding 15; Pet. App. 26).

Petitioners also engaged in extensive propaganda activities for the enemy, both within and without the camps. They wrote articles for enemy newspapers and magazines, delivered lectures, drew cartoons and posters, took roles in plays and moving pictures, signed and circulated petitions and letters, and made recordings for radio broadcasts. This propaganda, designed to assist the enemy's prosecution of the hostilities, generally condemned the United States and its government, while extolling the virtues of communism and the communist countries. Petitioners depicted the United States as an aggressor, described atrocities which they falsely said they saw American soldiers commit, and falsely described the conditions of the American prisoners of war as good. They testified to

the use of germ warfare by the United States and, describing the American system of government as "fascistic", declared that life was better in China than in the United States (Findings 8, 9, 10, 11, 14, 19, 20, 27, 28; Pet. App. 21-23, 25, 28, 31-32).

During their detention, petitioners mixed socially with enemy troops. They attended parties, visited Chinese company and regimental headquarters frequently, and circulated with the Chinese officers, both inside and outside the prison camp. Petitioner Cowart lived in the Chinese regimental headquarters for some time (Findings 13, 22, 29; Pet. App. 24, 29, 33).

Each of the petitioners declared his hostility to the United States and pledged his adherence to the cause of the enemy. Petitioner Griggs wore a Chinese medal; Bell and Cowart wore the Chinese uniform and Chinese medals (Findings 25, 13, 21; Pet. App. 30, 24, 28-29). Bell stated that he wished to fight for China and against the United States, and had attempted to join the Chinese Army (Finding 12; Pet. App. 23-24). Cowart stated that he wished to study in China and then return to the United States to help in the overthrow of the American government (Finding 23; Pet. App. 29). Griggs stated that, if given a weapon, he would fight the forces of the United Nations in Korea, and expressed the willingness to "sell out" the United States for "a tailor-made cigarette" (Finding 28; Pet. App. 32-33). Each of the petitioners confirmed this renunciation of his allegiance to the United States by refusing repatriation

when it was offered after the signing of the Korean armistice, and electing to go to communist China.

Petitioners were administratively discharged from the United States Army in January 1954 (Findings 16, 24, 30; Pet. App. 26, 30, 33). They returned to the United States in July 1955. On November 8, 1955, they filed claims with the Department of the Army requesting pay and allowances from the date of their capture until the date of their discharge. Their claims were denied on October 2, 1956, and on December 31, 1956, petitioners brought suit in the Court of Claims for pay and allowances from capture to discharge.¹

In the court below, petitioners introduced no evidence, did not testify, and stipulated the facts summarized above pertaining to their conduct during the period involved. The Government offered testimony to prove the falsity of some of the propaganda charges pertaining to "germ warfare" and other alleged American misconduct, but petitioners agreed that the charges were false. The parties also stipulated that the net amounts due to petitioners, should their claims be allowed, would be as follows: Bell, \$1,455.29; Cowart, \$4,991.13; Griggs, \$2,810.44.

¹ Petitioners now state that they seek pay which accrued prior to their capture (Pet. 21). However, their claims filed with the army, and their petition to the Court of Claims, did not request or mention pre-capture pay (petition in the Court of Claims, paras. III, VII, and X). The court below did not mention the issue of pre-capture pay because the issue was never before it.

ARGUMENT

This case presents a relatively narrow and presumably non-recurrent question of statutory construction; there is, and can be, no conflict of decisions between lower courts²; and the Court of Claims below correctly determined that Congress did not intend that captured soldiers be paid for a period in which they were willingly serving the enemy. There is no occasion for review by this Court.

1. To the best of our knowledge, this case is the first in the history of this country in which captured American soldiers have served an enemy of the United States and then sued for pay from the United States for the period in which they were doing so. Moreover, there are no other claims of this kind arising out of the Korean conflict; and there is no prospect of similar claims in the foreseeable future.

2. Absent a statute which entitles them to pay, petitioners clearly have no right to pay for the period for which they sue. As this Court has held, a soldier who criminally breaks his contractual obligation of faithful service to the United States is not entitled—absent some governing legislation—to any pay for the period of his enlistment. *United States v. Landers*, 92 U.S. 77. Petitioners' conduct unquestionably constituted criminal breach of their obligations to render faithful service to the United States. The record leaves no doubt that petitioners gave aid and comfort

² Pay claims are within the exclusive jurisdiction of the Court of Claims. 28 U.S.C. 1346(d).

to the enemy,³ which is the military equivalent of treason.

3. The Missing Persons Act (50 U.S.C. App. (1952 ed.) 1001 *et seq.*) upon which petitioners rely, contains nothing to indicate a Congressional purpose to pay soldiers for a period during which they voluntarily serve the enemy. The Act provides that a person "in active service * * * who is officially determined to be absent in a status of * * * captured by a hostile force" is entitled to pay and allowances. 10 U.S.C. App. (1952 ed.) 1002, *supra*, pp. 2-3. The term "active service" is defined to mean "active service in the Army * * * of the United States." 10 U.S.C. App. (1952 ed.) 1001, *supra*; p. 2. Since petitioners were found to be in the service of the enemy, they lost their status as persons "in active service in the Army * * * of the United States * * * captured by a hostile force." That Congress did not intend soldiers in petitioners' position to receive pay is also reflected by the provision in the Missing Persons Act to the effect that deserters and others

³ See Art. 104 of the Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 698; *United States v. Dickenson*, 6 USCMA 438, 20 CMR 154; *United States v. Batchelor*, 7 USCMA 354, 22 CMR 144; see, also, Art. 105 of the Code, 50 U.S.C. (1952 ed.) 699.

* Petitioners contend that the United States in its answer in the court below admitted that they were in the active service of the Army of the United States. No such admission was made, however, and the United States denied that petitioners were in the U.S. Army (para. V of the answer). The routine administrative action promoting petitioners to corporal, taken in ignorance of petitioners' service to the enemy, did not affect petitioners' status, and did not bind the United States (see p. 11, *infra*).

absent without authority shall not be entitled to pay. 50 U.S.C. App. (1952 ed.) 1002, *supra*, p. 3. Desertion merely results in a failure of the soldier to serve his country. But when petitioners entered into the service of the enemy, not only did the United States lose their services, but the enemy acquired additional strength, to the detriment of the United States and their fellow prisoners who remained loyal. Indeed, while petitioners did not bear arms against the United States, it was apparently only because the enemy determined that petitioners would be more useful to its cause as propagandists, informers, and camp guards than as fighting soldiers.⁵ It would be most strange to ascribe to Congress the belief that soldiers who have engaged in such activities should receive more favorable treatment than mere absentees.⁶

Petitioners' reliance (Pet. 10, 16) upon R.S. 1288, *supra*, p. 4,⁷ concerning the pay of captured soldiers, is misplaced. The Missing Persons Act, which was

⁵ Petitioners Bell and Griggs explicitly stated their willingness and desire to fight for the Chinese Communists against the United States and her allies (Findings 12, 28; Pet. App. 23-24, 32-33). Petitioner Cowart, who wore the uniform of the Chinese Communists, stated that he hated America and wished "to help in the overthrow of the [American] Government" (Finding 23; Pet. App. 29).

⁶ The Act provides that the determination of the head of a department as to the serviceman's status under the Act shall be conclusive. 10 U.S.C. App. (1952 ed.) 1009, *supra*, pp. 3-4. Since petitioners do not come within the terms of the Act, we need not discuss the effect of the army's administrative determination that petitioners were not in a status which gave them a right to pay. However, we reserve the right to raise that issue as a defense against petitioners' claims, if certiorari is granted.

⁷ 37 U.S.C. 242 (formerly 10 U.S.C. (1952 ed.) 846).

passed in 1942, provides for pay and allowances of servicemen who are captured, as well as for those who are missing, interned in a foreign country, or beleaguered or besieged. Any inconsistency between the two statutes should be resolved in favor of the Missing Persons Act. In any event, R.S. 1288 cannot be read as giving petitioners a right to the pay in question. It provides that when an army enlisted man is captured he shall be entitled to receive "during his captivity" the same pay which he would receive "while in the actual service of the United States." Petitioners are in no position to assert that they were in captivity, since they served the enemy voluntarily and refused to accept repatriation to the United States at the conclusion of hostilities.

4. Petitioners also contend that they are entitled to pay because the army carried them on its rolls until January 23, 1954 (Pet. 16-17). However, the Missing Persons Act specifically authorizes the army to "change or modify a previous determination" as to status under the Act "when circumstances warrant reconsideration." 50 U.S.C. App. (1952 ed.) 1009, *supra*, pp. 3-4. The army later determined that petitioners were not in a status during the critical period which entitled them to pay for that time. The United States is therefore not bound by prior determinations of status made by the army in ignorance of the petitioners' service to the enemy.

5. Judge Madden, in his dissenting opinion below, suggests that a court-martial or criminal prosecution in a civilian court would have been more appropriate in this case than the procedure actually followed. Yet

the Court of Claims is as well equipped to consider the petitioners' "age, their upbringing, their mental qualities, the nature of the pressures to which they were exposed" (Pet. App. 17) as a court-martial* or some other civilian court. Petitioners, acting through counsel of their own choice, decided not to introduce evidence concerning those matters and the record in this case does not bear out Judge Madden's conjecture (Pet. App. 16-17) that petitioners might have been subject to "subtle brainwashing techniques" or other "pressures."

The dissent also expressed the view (Pet. App. 17) that the army had "forfeited the pay already accrued * * *" to the petitioners, in spite of a provision in the Uniform Code of Military Justice which withdrew from courts-martial the authority to forfeit pay and allowances already accrued. 50 U.S.C. (1952 ed.) 638. There was, however, no forfeiture of accrued pay in the present case. The army determined that the petitioners had no right to pay for the period following capture, and it is the initial right to pay—not a forfeiture of pay admittedly once due—which is the subject matter of this litigation.* Nor is there anything particularly "crude and primitive" (Pet. App. 17) in refusing to pay the petitioners money to which they

*The attempt to try petitioners for their crimes by court-martial failed since they returned to this country after their administrative discharge from the army (Pet. 4-5).

*Similarly, a deserter has no right to pay for the period following his desertion, and a court-martial sentence is not a prerequisite for refusal to pay. 37 U.S.C. 33(b); *United States v. Kingsley*, 138 U.S. 87.

have no right. The United States does not normally pay legal claims which it believes invalid, any more than private individuals do.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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